Office - Supreme Court, U.S.
FILED
DEC 23 1957
JOHN T. FEY, Clerk

LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 579

SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al., Appellees.*

REPLY OF APPELLANTS TO MOTION OF RAILROAD APPELLEES AND MOTION OF APPELLEE CRAMET, INC., TO AFFIRM.

HENRY L. WALKER,
ARTHUR J. DIXON,
JAMES A. BISTLINE,
Southern Railway Building,
Washington, D. C.

R. GRANVILLE CURRY,
631 Southern Building,
Washington, D. C.
For Appellants.

December 23, 1957.

SUBJECT INDEX

	Page
The Basic Facts	2
Argument	6
I. Appellees Erroneously Fail to Recognize That Statutory Standards Have Been Violated	6
II. Appellees Fail to Discuss the Switching-Agency Cases Relied Upon by Appellants and Misconceive the Agency Relationship	9
III. Appellees Erroneously Fail to Recognize That the Tariff Effective June 23, 1954, Not Only Changed the Rate Situation But Converted CNO&TP's Service From That as Agent to That as Independent Carrier	11
IV. Appellees Erroneously Overlook That the Commission's Order Requires Invasion of CNO&TP's Terminal Facilities Without Statutory Authority	14
Conclusion	17

CITATIONS

CASES:

Automobiles to Southern Ports for Export, 225 I.C.C. 225	9
Barber Asphalt Co. v. *L. & N. R. R. Co.*, 88 I.C.C. 307	16
Denver & Rio Grande West. R. Co. v. *Union Pac. R. Co.*, 351 U.S. 321	7
Dixie Carriers v. *United States*, 351 U.S. 56	8
Du Pont de Nemours Powder Co. v. *P. R. R. Co.*, 50 I.C.C. 203	16
East Texas Motor Fr. Lines v. *Frozen Food Express*, 351 U.S. 49	8
Ezee Flow Corp. v. *Illinois Central R. Co.*, 287 I.C.C. 281	9
Georgia & F. R. v. *Atlantic Coast Line R. Co.*, 191 I.C.C. 489	17
Goddard, Joseph A., Realty Co. v. *New York, C. & St. L. R. Co.*, 229 I.C.C. 497	12
Hastings Commercial Club v. *C., M. & St. P. Ry. Co.*, 69 I.C.C. 489	14, 16
Hillsboro Coal Co. v. *C., C., C. & St. L. Ry. Co.*, 63 I.C.C. 401	13
Hunt, Helm, Ferris & Co. v. *C. & N. W. Ry. Co.*, 68 I.C.C. 283	16
Hylton Flour Mills v. *Los Angeles & S. L. R. Co.*, 152 I.C.C. 81	16
Lumber From and To Hampton & Branchville R. Co., 264 I.C.C. 419	17

Page

Missouri-Pac. R. Co. v. *Reynolds-Davis Grocery Co.*, 268 U.S. 366 ... 9
Pennsylvania Co. v. *United States*, 236 U.S. 351 ... 15
Routing From or To Cantonment, Fla., 288 I.C.C. 708 ... 17
Routing Via Hampton & B. R., 148 I.C.C. 547 ... 17
Rutile Ore, Gulf and South Atlantic Ports to Tennessee, 298 I.C.C. 439 2
Seaboard Air Line R. Co. Routing Cancellation, 301 I.C.C. 129 ... 17
Shaffer Transportation Co. v. *United States*, Docket No. 20, 26 U.S. Law Week 4039 ... 8
Simons v. *Central of Georgia Ry. Co.*, 298 I.C.C. 433 ... 17
Social Security Board v. *Nierotko*, 327 U.S. 358 ... 8
Thompson v. *United States*, 343 U.S. 549 ... 6, 7, 17
United States v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 ... 8
United States v. *Contract Steel Carriers*, 350 U.S. 409 ... 8, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 579

SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al., Appellees.*

REPLY OF APPELLANTS TO MOTION OF RAILROAD APPELLEES AND MOTION OF APPELLEE, CRAMET, INC., TO AFFIRM.

Appellees filing motion. This reply is to the motion of railroad appellees and appellee, Cramet, Inc., to affirm the judgment of the District Court.

No motion by the Government. It is believed significant that while the United States of America and Interstate Commerce Commission are appellees, neither has filed a motion to affirm. It seems reasonable to infer from this that they do not agree with the other appellees and that they view appellants' Jurisdictional Statement as sufficient to demonstrate that the questions

raised are important and justify further consideration by this Court.

THE BASIC FACTS

The suit here involved is one to set aside that portion of an order of the Interstate Commerce Commission (298 I.C.C. 439), (a) requiring the appellee, CNO&TP, to perform switching between Chattanooga, and Boyce, Tenn., as an agent for the railroad appellees, the line-haul carriers, thus forcing the CNO&TP to give up its independent status as a line-haul, connecting carrier, in contravention of the short-hauling provisions of section 15(4) of the Interstate Commerce Act (49 U.S.C., sec. 15(4)), (b) making such requirement and thus invading the CNO&TP's terminal without compliance with section 3(5), and (c) forcing appellants to relinquish their common law and statutory rights without necessary findings and evidence to support such action.

The railroad appellees appear to stray from the basic facts having significance with respect to the question here involved, and resort to a discussion of the part of the Commission's order and the facts relating thereto which are not here in issue (pp. 3, 6-10). Appellants are not attacking the Commission's order prescribing line-haul rates on rutile ore. The appellees prevailed as to such rates, and appellants' attack does not relate to that part of the order.

The basic question here, as the lower Court stated, is with respect to "reciprocal switching".* The significant facts are as follows:

---

* The lower Court said that in this case "we are concerned solely with reciprocal switching" (Appendix A, p. 3a to Jurisdictional Statement).

(1) The plant of the appellee, Cramet, and the plants of several other industries, are located on the River track of the CNO&TP (part of the Southern Railway System) in Boyce, Tenn., a short distance beyond the city limits of Chattanooga, Tenn.

(2) The CNO&TP connects at Chattanooga with the lines of appellees, C. of G., the NC&StL (now part of the L&N), and the TA&G*, in addition to other lines of the Southern Railway system.

(3) At the time of the proceeding before the Commission, joint line-haul rates applied to Cramet and other industries in Boyce, with the CNO&TP, a participating carrier in such joint rates and receiving a division thereof for its haul between its connection with the line-haul carrier at Chattanooga, for example, the Central of Georgia, and the Cramet plant, or other industry, on the River track in Boyce (See sketch, Juris. Stat., p. 9).

(4) The joint rates thus in effect to Boyce, or from Boyce, and with CNO&TP, a participant therein as a connecting carrier in its own right, were, and are, for all practical purposes the same as the rates to and from Chattanooga. Thus Cramet and other industries on the River track in Boyce have the same rates as industries in Chattanooga.**

---

* These railroads are the Central of Georgia Railway Company, the Nashville, Chattanooga & St. Louis Railway Company, the Louisville & Nashville Railroad Company and the Tennessee, Alabama & Georgia Railway Company.

** In the Cramet motion it is said (p. 10): "It is conceded on both sides that the existing line-haul rates provided in the tariffs of all carriers are generally the same to and from Boyce as to and from Chattanooga."

(5) Prior to June 23, 1954, the industries on the River track in Boyce were in the Chattanooga reciprocal switching district. Under such reciprocal switching arrangement CNO&TP acted as switching agent for the line-haul carrier, for example, the Central of Georgia, in performing the service between its connection with that carrier and the industry on the River track. For such service it collected a switching charge from the line-haul carrier, the charge being absorbed by that carrier. The effect was that the rate of the line-haul carrier applied from point of origin to the Cramet plant, or other plant, in Boyce on the River track.

The CNO&TP was not a participating carrier in the line-haul rate under such reciprocal switching arrangement and was not entitled to a division thereof. On outbound shipments the CNO&TP was not the bill-of-lading carrier and did not participate in the rate of the principal carrier, which made out the bill-of-lading in its own name.

(6) By tariff, effective June 23, 1954, eight months before Cramet filed its complaint with the Commission, the reciprocal switching arrangement as to traffic to and from the Boyce industries was cancelled as of that date. Although the tariff was protested prior to its effective date it was not suspended. The actual effect of the tariff was to cancel reciprocal switching. It ended CNO&TP's service as an agent of the line-haul carrier, and enabled it to participate, as it then did, as a connecting carrier in its own right under joint rates with the line-haul carriers and to receive a division of the joint rate for its service between the plant of the industry at Boyce and the connection of the line-

haul carrier in Chattanooga, such division being substantially greater than the switching charge.

The tariff which cancelled the reciprocal switching arrangement on June 23, 1954, expressly provided:

> "The CNO&TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn."

Thus there was put to an end not only the making of a switching *charge* but the rendering of a switching *service* as agent for the line-haul carrier. The tariff provided, as an exception, that if the Boyce line-haul rates should be different from the Chattanooga line-haul rates reciprocal switching would be performed by the CNO&TP thus making applicable the lower Chattanooga line-haul rate. This was provided in order to protect the industries against ever paying more for the transportation to or from Boyce than to or from Chattanooga. Such rate differences were in substance non-existent, and the exception; therefore, has not been used though available. Both the Commission and the Court were in agreement that for practical purposes the switching arrangement had been cancelled.

(7) In like manner the Southern had cancelled reciprocal switching as to industries in North Chattanooga, an area, like Boyce, in the outskirts of the City of Chattanooga. This was done as long ago as 1939. The tariff provisions were practically the same as those in the present case. The North Chattanooga industries are served under joint line-haul rates, with the Southern a connecting carrier in performing the transportation service to and from the plant, just as the CNO&TP performs the service as a line-haul carrier between Chattanooga and Boyce.

The appellees filing motions here have failed to mention the North Chattanooga situation. There are some 36 industries in that area, and none has complained. They, like the industries here, are fully protected by having the same rates as the Chattanooga rates.

The Commission's requirement. As shown in the Jurisdictional Statement, the Commission by the order here under attack ordered restoration of reciprocal switching by CNO&TP as to the Boyce industries. It thus forced this carrier to give up its right to handle traffic between Chattanooga and the Boyce industries as a connecting common carrier, entitled to a division of the joint rates applicable to the entire transportation service. CNO&TP was thus compelled to change its status from an independent connecting carrier entitled to the haul between Chattanooga and Boyce in its own right to a mere agent for the line-haul carrier, with a switching charge less than its division as a connecting carrier.

Such action, it is believed, is based upon an utter misconstruction of the short-hauling provisions of the Act, is in disregard of the controlling facts, and is invalid.

ARGUMENT

I. APPELLEES ERRONEOUSLY FAIL TO RECOGNIZE THAT STATUTORY STANDARDS HAVE BEEN VIOLATED.

This Court has had occasion to point out how Congress has carefully provided for protecting the rights of railroads to their long hauls and how, in spite of repeated efforts by the Commission to have such rights eliminated from the Act, Congress has refused to do so. For example, in *Thompson* v. *United States,* 343 U.S. 549, 554 (1952), the Court refers to the attempts by the Commission to have Congress "delete completely

the short-hauling restriction" and the refusal of Congress to do so. See also the comments of Mr. Justice Frankfurter in his dissenting opinion in *Denver & Rio Grande West. R. Co.* v. *Union Pac.*, 351 U.S. 321, 336-337 (1956). In that case, the Court referred to the *Thompson case* and again stressed the importance of compliance with the short-hauling provisions of the Act, saying (p. 327):

> "We there emphasized the purpose of section 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunkline 'short-hauls' without faithful observance of restrictive conditions imposed by that section."

Appellants recognize that if there is an already existing "through route" the restrictions in section 15(4) do not apply, because these restrictions would have effect only where a through route would be established by the Commission. Here, however, the Commission by its order seeks to establish a new through route, without complying with the requirements in section 15(4).

It is believed to be utterly illogical and contrary to common sense, to say that CNO&TP is not deprived of its haul which it is performing in its own right as a connecting carrier, when the Commission requires it to give up that haul and to act merely as an agent for another carrier which is the principal in furnishing the service, is the billing carrier, and is the only one publishing the line-haul rate or concurring with other line-haul carriers therein. (Juris. Stat., pp. 8-10).

In other words, the Commission by its order requires a new and different route in so far as the CNO&TP is

concerned, because it requires a new route as to which the CNO&TP has no haul in its own right as a connecting carrier.

It is to be remembered that this Court has clearly pointed out in *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946), that:

> "[a]n agency may not finally decide the limits of its statutory power. That is a judicial function."

See also *East Texas Motor Fr. Lines* v. *Frozen Food Express*, 351 U.S. 49, 54 (1956), *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942), *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956), and *United States* v. *Contract Steel Carriers*, 350 U.S. 409 (1956).

In *Shaffer Transportation Co.* v. *United States*, Docket No. 20, 26 U.S. Law Week 4039, decided on December 9, 1957, this Court in setting aside an order of the Commission said:

> "* * * we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress."

The order here under attack is not in compliance with, but is directly contrary to, the "mandate of Congress". The Commission has misconstrued and misapplied the short-hauling provisions of the Act, has contravened the policy and purpose of Congress, and has transcended statutory standards without warrant of law.

II. APPELLEES FAIL TO DISCUSS THE SWITCHING-AGENCY CASES RELIED UPON BY APPELLANTS AND MISCONCEIVE THE AGENCY RELATIONSHIP.

A striking fact in the motions of appellees is their avoidance of any reference to the cases cited by appellants showing that under reciprocal switching arrangements, the carrier performing the switching, CNO&TP, in the present case, is a mere agent of the line-haul carrier. Thus appellees fail to meet or distinguish *Missouri-Pac. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U.S. 366 (1925), in which the Court held that the switching carrier at destination was "simply the agent of the Missouri Pacific [the last line-haul carrier] for the purpose of delivery" and that "The Missouri Pacific was the delivering carrier and is liable as such".

Nor do appellees mention or seek to distinguish *Ezee Flow Corp.* v. *Illinois Central R. Co.*, 287 I.C.C. 281. There the question was as to responsibility for misrouting. The switching carrier "merely performed a switching movement within the Chicago switching district to its connection with the Illinois Central". The latter carrier "performed the entire line-haul service from Chicago", and, as the Commission said, the "Illinois Central, therefore, was responsible as the initial carrier, the switching carrier having acted merely as its agent".

Appellees do not refer to *Automobiles to Southern Ports for Export*, 225 I.C.C. 225, 229, also cited by appellants, in which it was held that the switching line was merely an agent of the line-haul carrier.*

---

* There it was shown that the Canadian Pacific the line-haul carrier, "issues its own bills of lading and waybills on traffic from Detroit to the Canadian ports, which traffic is local to its

The railroad appellees (p. 6) admit that when the reciprocal switching arrangement was in effect prior to June 23, 1954, "all lines serving Chattanooga, Tenn., have been able to *reach those industries* as a *terminating* or *originating line-haul carrier* * * *" (Emphasis supplied). They thus must recognize the unmistakable fact that they were in reality the line-haul carriers to and from the industries and the CNO&TP was merely an agent in connection with their line-haul transportation. . .

The railroad appellees further admit that upon the cancellation of reciprocal switching on June 23, 1954, this "action on the part of the CNO&TP effectively localized the firms and industries on its switching tracks at Boyce * * *" (p. 8). They thus must recognize that Cramet and other industries in Boyce on the River track were made "local" to the line of that carrier, and that it then acquired an entirely different status, namely, that of a connecting carrier operating, not as an agent, but performing a haul local to its own line as an independent carrier in its own right.

To take away this haul by the CNO&TP, as the Commission's order requires, and to force this carrier to act merely as a switching agent is to change its char-

---

line, with no participation of any other railroad in the service or revenue *except that it absorbs the charges of other lines for switching traffic to it from points within the Detroit switching limits*" (Emphasis supplied). The switching carriers were United States companies. Holding that the United States "switching line is not a party to the joint rate, but is merely an agent of the line-haul carrier", the Commission concluded that such switching service by the United States carrier did not make it an independent participant in the transportation over the Canadian Pacific and that the switching carrier could not, therefore, be held responsible for unlawful discrimination between ports.

acter completely and to deprive it of the haul to which it is entitled and to divisions which it has the right to receive as an independent participating carrier, without compliance by the Commission with section 15(4) of the Act.

III. APPELLEES ERRONEOUSLY FAIL TO RECOGNIZE THAT THE TARIFF EFFECTIVE JUNE 23, 1954, NOT ONLY CHANGED THE RATE SITUATION BUT CONVERTED CNO&TP'S SERVICE FROM THAT AS AGENT TO THAT AS INDEPENDENT CARRIER.

Railroad appellee argue that the "effect of the Commission's order is merely to continue in existence through routes which have been in effect" for many years and not the establishment of a new route (p. 20). The assumption is that the reciprocal arrangement which was in existence prior to June 23, 1954, was altered as to *charges* and not as to routes by the tariff which became effective on June 23, 1954, and that the tariff "merely had the effect of requiring a division of the total freight charges rather than the assessment of a switching charge for the switching service performed insofar as competing carriers were concerned" (p. 19).

Appellees erroneously fail to perceive that the CNO&TP by its tariff, effective June 23, 1954, expressly cancelled the reciprocal switching arrangement which had theretofore existed. The tariff not only banned switching *charges* but stated in no uncertain terms that "CNO&TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn."* (Juris.

* As previously stated, the tariff contained an exception applicable only where the Chattanooga rates are different from the Boyce rates but this was a situation practically non-existent. In fact, the rutile ore rates prescribed by the Commission were the same to both Boyce and Chattanooga and rates on other traffic are shown to be the same to both points, no movement of traffic being shown

Stat., Appendix B, p. 20a). Thus CNO&TP clearly provided for the end of switching *service,* and not merely of switching charges, between Chattanooga and Boyce, and provided for a different character of service, namely, as a local carrier participating in joint rates with the line-haul carriers and performing in its own right the haul between Chattanooga and Boyce.

CNO&TP did not, as the lower Court erroneously assumed, have to obtain permission from the line-haul carriers to cancel the reciprocal switching arrangement. As previously noted, it was merely a switching agent under the reciprocal switching arrangement and could end that arrangement, as it did, by the tariff effective June 23, 1954.

Appellees do not refer to, and are unable to escape from *Joseph A. Goddard Realty Co.* v. *New York, C. & St. L. R. Co.,* 229 I.C.C. 497, 498, cited by appellants and holding that the carrier performing the switching can alone cancel reciprocal switching arrangements.

There it was shown that reciprocal switching on the line of the defendant railroad was cancelled by tariff authority on April 6, 1936, but that "The grocery company [a complainant] had received reciprocal switching service on this spur track for many years" (p. 498).

---

as to any situation in which the rates are different (R. 25, 109, 123, 210, 240, and 351). Thus the actual effect of the June 23, 1954, tariff was to cancel reciprocal switching and this was recognized by the Court which said that in "reality, the rates from or to Boyce and Chattanooga are so seldom different that the effect of the action [of June 23, 1954] was that on competitive traffic destined to or from Boyce, CNO&TP refused to switch" (App. A, p. 4a, Juris. Stat.). The Commission made a similar finding (p. 445). The actual effect of the tariff was to cancel the reciprocal switching arrangement.

The complainants asked the Commission "to require defendant to restore reciprocal switching service to them" (p. 497). In holding that it had no power to require such restoration of reciprocal switching in view of the provisions of section 15(3) and (4) the Commission said (p. 502):

> "The complaint seeks in effect through routes over other lines to Muncie and the use of defendants line only for a switching operation, which would short haul defendant and bring the situation squarely within the limitation upon our power to prescribe through routes. In other words, we are asked to do under section 1 that which under section 15(4) we are directly prohibited from doing."

It is plain from the decision that in that case, as in the present one, the tariff cancelling reciprocal switching terminated the preexisting switching practice, irrespective of how many years it had been in effect. Also the decision makes clear that although during that past period there had been such an arrangement it could not be relied upon, in view of the change brought about by the tariff, as continuing a through route, but that instead the haul of the defendant carrier after termination of the switching arrangement could not be taken away from it without complying with the restrictions in section 15(4) of the Act.*

Railroad appellees seek to excuse the lower Court's statement that the "action on the part of plaintiffs having been *suspended by the Commission* for investi-

---

* See also *Hillsboro Coal Co.* v. *C.C.C. and St. L. Ry. Co.*, 63 I.C.C. 401 in which a reciprocal switching arrangement had been ended by the switching carrier and restoration of the switching arrangement, it was held, could not be required without contravening the short-hauling provisions of the Act.

gation, the burden is upon plaintiffs to show its action is consistent with the public interest" (Emphasis supplied. Juris. Stat. App. 8a). Examination of the decision shows that the lower Court was under the erroneous impression that the question of reciprocal switching involved a *suspension* proceeding when this is clearly not the fact (Juris. Stat., pp. 11-13).

IV. APPELLEES ERRONEOUSLY OVERLOOK THAT THE COMMISSION'S ORDER REQUIRES INVASION OF CNO&TP's TERMINAL FACILITIES WITHOUT STATUTORY AUTHORITY.

The Commission's order requiring CNO&TP to become a mere agent for the line-haul carriers in the transportation service between Chattanooga and Boyce not only does violence to the short hauling provisions of section 15(4) but requires in substance invasion of CNO&TP's terminal facilities without complying with section 3(5) of the Act.

By section 3(5) Congress has clearly shown its purpose to protect railroad terminal facilities from invasion by other railroads unless certain findings are made, and there is no semblance of such findings in the present case.*

Railroad appellees seek to argue (pp. 24-25) that because appellants called attention before the Commission to the fact that the statement by the Examiner that the CNO&TP was asked to permit use of its terminals and tracks at Chattanooga and Boyce by other rail carriers was incorrect and that appellants stated that the issue was as to requiring "reciprocal switching", this precludes consideration of section 3(5) in the present proceeding.

---

* This is clear from the *Hastings case*, 69 I.C.C. 489, and similar cases cited in the Jurisdictional Statement, pages 21, 22.

The statement before the Commission is in fact confirmatory of the very contention here made, namely, that the opposing railroads made no pretense of seeking to justify a reciprocal switching order under the provisions of section 3(5), offered no evidence in support of such a position, and could not, therefore, rely upon it as an excuse for the Commission's action.

It is interesting to note that the appellee, Cramet, does not join the railroad appellees in their contention.

Appellants have shown* not only that the Commission's order cannot be sustained under the theory of section 3(5) but also that it cannot be upheld on the theory of unlawful discrimination under other provisions of section 3.

Admittedly, there has been no finding by the Commission of unlawful discrimination. The well-established rule is that one carrier cannot be required to perform reciprocal switching for another, or to turn its facilities over to another under reciprocal switching arrangements in the absence of a showing of undue prejudice

---

* Railroad appellees contend (p. 24) that in *Pennsylvania Co.* v. *United States*, 236 U.S. 351 (1915), this Court held that the provisions of section 3 were inapplicable under "similar circumstances" (p. 24). Appellees misconceive the decision. The provisions of section 3(5) of the present Act were not even in existence at the time of that decision. Moreover, the case turned on discrimination in that the switching line (the Pennsylvania Railroad) interchanged traffic and switched for three other railroads but refused to switch for BR&P. There is no such situation as to the CNO&TP here. The Court said "All that the Commission ordered was that the Company [Pennsylvania] desist from the discriminatory practice here involved."

or unjust discrimination in violation of section 3 of the Act, and there is no such finding.*

Moreover, while the appellees fail to mention the situation at North Chattanooga, the fact is that the cancellation of reciprocal switching as to the Boyce industries was like the cancellation of reciprocal switching some years before that time as to the North Chattanooga industries, and that service under joint rates has been entirely satisfactory, with no complaint from the thirty-six industries served (Juris. Stat., p. 21). Here Cramet and other industries in Boyce pay the same rates as industries in Chattanooga and North Chattanooga, and cannot claim any rate injury. Nor can they claim any service injury. Furthermore, the opposing line-haul carriers with lines reaching Chattanooga and having joint rates with the CNO&TP to and from the Boyce industries can solicit traffic over their routes under the joint rates applicable and obtain movement of traffic without any rate disadvantage, since the rates over those routes are the same as via the Southern System routes.**

---

* The Commission, for example, said in *Hylton Flour Mills* v. *Los Angeles & S. L. R. Co.*, 152 I.C.C. 81, 82, "We have repeatedly found that, in the absence of unjust discrimination or undue prejudice, we cannot require a carrier to absorb the switching charges of another." See also *Barber Asphalt Co.* v. *L. & N. R. R. Co.*, 88 I.C.C. 307; *Du Pont de Nemours Powder Co.* v. *P. R. R. Co.*, 50 I.C.C. 203; *Hunt, Helm, Ferris & Co.* v. *C. & N. W. Ry. Co.*; 68 I.C.C. 283, and *Hastings Commercial Club* v. *C. M. & St. P. Ry. Co.*, 69 I.C.C. 489, 496.

** Railroad appellees, having themselves largely protected their long-haul routes, are now endeavoring to criticize the Southern Railway for seeking to protect its long-haul route here involved. They cite various cases involving the Southern Railway in this connection. (p. 3). They do not refer to numerous cases showing where they have sought to protect their own long hauls. Some examples

The invasion of the CNO&TP terminal facilities required by the Commission's order not only flies in the face of the short-hauling restriction of section 15(4) but is without support under any other section of the Act. The Commission has made no findings, and there is no evidence, to support the part of the order here under attack. It is contrary to the controlling facts, and is basically unsound because of a misunderstanding and misapplication of the pertinent provisions of the Interstate Commerce Act. See the *Thompson case*, 343 U.S. 549, 561, and *United States* v. *Contract Steel Carriers*, 350 U.S. 409, 412.

CONCLUSION

Appellants respectfully submit that the motions of the railroad appellees and of the appellee, Cramet, Inc., (which are not supported by any motion of the United States or the Interstate Commerce Commission) are based on fallacious assumptions and erroneous interpretation of the statute and are without merit. They respectfully submit that the motions of appellees should, therefore, be denied, that the case should be considered by the Court on briefs and oral argument,

---

are *Routing Via Hampton & B. R.*, 148 I.C.C. 547 (1928) (Atlantic Coast Line authorized to eliminate intermediate carrier); *Georgia & F. R.* v. *Atlantic Coast Line R. Co.*, 191 I.C.C. 489 (1933) (Attempt of Atlantic Coast Line, Clinchfield Railroad and Charleston & Western Carolina to close various routes); *Lumber From and To Hampton & Branchville R. Co.*, 264 I.C.C. 419 (1946) (Atlantic Coast Line authorized to eliminate routes).; *Routing From Or To Cantonment, Fla.*, 288 I.C.C. 708 (1953) (L&N authorized to eliminate certain routes); *Simons* v. *Central of Georgia Ry. Co.*, 298 I.C.C. 433 (1956) (C. of Ga. long-haul recognized); and *Seaboard Air Line R. Co. Routing Cancellation*, 301 I.C.C. 129 (1957) (Seaboard Air Line authorized to cancel certain routes).

and that that part of the Commission's order herein sought to be set aside should be held to be invalid.

Respectfully submitted,

HENRY L. WALKER,
ARTHUR J. DIXON,
JAMES A. BISTLINE,
Southern Railway Building,
Washington, D. C.

R. GRANVILLE CURRY,
631 Southern Building,
Washington, D. C.
For Appellants.

December 23, 1957.

PROOF OF SERVICE

I, R. Granville Curry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of December, 1957, I served copies of the foregoing reply on the several parties hereto, as follows:

(1) On the United States, by mailing a copy in a duly addressed envelope, with first-class mail postage prepaid, to—

The Solicitor General,
Department of Justice,
Washington 25, D. C.

Victor R. Hansen, Esq.,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

James E. Kilday, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

Charles R. Esherick, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

and by mailing a copy in a duly addressed envelope, with airmail postage prepaid to—

Lester S. Parsons, Jr., Esq.,
United States Attorney,
For the Eastern District of Virginia,
Federal Building,
Richmond, Va.

(2) On the Interstate Commerce Commission by mailing copies duly addressed with first-class postage prepaid to—

Robert W. Ginnane, Esq.,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

Samuel R. Howell, Esq.,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

(3) On intervening defendants by mailing copies duly addressed with air mail postage prepaid to their respective attorneys of record, as follows—

John W. Adams, Jr., Esq.,
104 St. Francis Street,
Mobile 8, Ala.

Charles P. Reynolds, Esq.,
147 Granby Street,
Norfolk 10, Va.

W. A. Miller, Esq.,
930 Broadway,
Nashville, Tenn.

Clifford T. Coomes, Esq.,
908 W. Broadway,
Louisville 1, Ky.

R. B. Claytor, Esq.,
c/o Norfolk & Western Ry. Co.,
Roanoke, Va.

R. B. Gwathmey, Esq.,
c/o Atlantic Coast Line R. R. Co.,
Wilmington, N. C.

Walter C. Scott, Jr., Esq.,
P.O. Box 642,
Savannah, Ga.

John S. Davenport, III, Esq.,
1300 Travelers Building,
Richmond, Va.

Robert N. Burchmore, Esq.,
Burchmore, Good, and Bobinette,
2106 Field Building,
Chicago, Ill.

and by mailing a copy in a duly addressed envelope with first-class mail postage prepaid to—

Martin A. Meyer, Jr., Esq.,
Investment Building,
Washington, D. C.

R. GRANVILLE CURRY

Motion to Affirm of Railroad Appellees

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.
FILED
DEC. 4 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 379

SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO AFFIRM

JOHN W. ADAMS, JR.
104 St. Francis Street
Mobile 8, Alabama
CHARLES P. REYNOLDS
147 Granby Street
Norfolk 10, Virginia
CLIFFORD T. COOMES
908 W. Broadway
Louisville 1, Kentucky
R. B. CLAYTOR
c/o Norfolk & Western Ry. Co.
Roanoke, Virginia
R. B. GWATHMEY
c/o Atlantic Coast Line R. Co.
Wilmington, N. C.
MARTIN A. MEYER, JR.
Investment Bldg.
Washington, D. C.
WALTER C. SCOTT, JR.
P. O. Box 642
Savannah, Georgia
Attorneys for Railroad

HITCH, MILLER & BECKMANN
P. O. Box 642
Savannah, Georgia

TABLE OF CONTENTS

	Page
Statement	2
Proceedings Before the Commission and History of the Case	3
The Proceeding Before the District Court	14
Argument	16
Conclusion	25
Proof of Service	27

Appendix "A" 1a

Appendix "B" 1a

Appendix "C" 3a

INDEX OF CITATIONS

CASES:

Agricultural Products Co. v. Atchison, T. & S. F. Ry. Co., 284 I.C.C. 505 17

American Trucking Assns. v. United States, 344 U.S. 298 25

Atchison, T. & S. F. Ry. Co. v. United States, 279 U.S. 768, 776-777 18

Cancellation of Routing, Paper, Gainesville M. R. Co., 299 I.C.C. 107 3

Carolina, C&O R. Co. v. Southern Ry. Co., 299 I.C.C. 335 (affirmed 153 F. Supp. 57) 2

Central of Georgia Railway Company v. The Cincinnati, New Orleans and Texas Pacific Railway Company, I.C.C. Docket No. 31677 ..... 2, 10

Cramet, Inc. v. The Alabama Great Southern Railroad Company, et al., I.C.C. Docket No. 31737 (May 4, 1956) 2, 4, 10, 12, 13, 14, 15

Great Northern Ry. Co. v. United States, 81 F. Supp. 921, 925 (affirmed 336 U.S. 933) 17

Page

Pennsylvania Co. v. United States, 236 U.S. 351 24
Routing Coal from Origins on Louisville & N. R., 300 I.C.C. 125 3
Rutile Ore from Gulf and South Atlantic Ports to Tennessee, I.C.C. I. & S. Docket No. 6284 .... 2, 12
Rutile Ore from Gulf and South Atlantic Ports to Tennessee, 298 I.C.C. 439 .... 3, 11
Salt Cake from Bessemer City, N.C. to Foley, Fla., 298 I.C.C. 544 3
Southern Railway Company v. United States, 154 F. Supp. 562 15
Spiller v. Atchison, T. & S. F. R. Co., 253 U.S. 117 25
St. Louis S. W. R. Co. v. United States, 245 U.S. 136, 142 25
Tennessee, A&G Ry. Co., Cancellation of Routing, 300 I.C.C. 515 3
United States v. Great Northern Ry. Co., 343 U.S. 562, 572, 573, 575 20
United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 25
United States v. Northern Pacific R. Co., 288 U.S. 490 25
Virginian Ry. v. United States, 272 U.S. 658 20

OTHER:

Judicial Code:

28 U.S.C. 1253 2
28 U.S.C. 2101(b) 2
28 U.S.C. 2284 2
28 U.S.C. 2323 15
28 U.S.C. 2325 15

Interstate Commerce Act:

49 U.S.C. 1 .... 4, 5
49 U.S.C. 1(4) 4, 22, 23
49 U.S.C. 1(5) 22, 23
49 U.S.C. 1(6) 22, 23
49 U.S.C. 3 .... 4, 5, 20, 22
49 U.S.C. 3(4) 4
49 U.S.C. 3(5) 24, 25
49 U.S.C. 15(1) 22, 23
49 U.S.C. 15(3) 19, 20
49 U.S.C. 15(4) 16, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 579

SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO AFFIRM

COME NOW the railroads, listed in Appendix "A" hereto, intervening defendants in the court below and appellees in this appeal, and pursuant to Rule 16 (1) (c) of the Revised Rules of this Court, respectfully move the Court to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal under 28 U.S.C. 1253 and 2101(b) from that portion of the final judgment entered on July 12, 1957, by a three-judge district court convened under 28 U.S.C. 2284 and 2325, dismissing the complaint of appellants which sought to enjoin and to set aside a portion of an order of the Interstate Commerce Commission (hereinafter referred to as Commission) entered in its Docket No. 31737, *Cramet, Inc.* v. *The Alabama Great Southern Railroad Company, et al.*, requiring the restoration by The Cincinnati, New Orleans and Texas Pacific Railway Company (hereinafter referred to as CNO&TP) of firms and industries located on its switching tracks in an area called Boyce, Tennessee, to the Chattanooga, Tennessee, reciprocal switching limits. The judgment from which the appeal is taken is reproduced as Appendix "B" hereto with that portion involved shown in italics. Similarly, the order of the Interstate Commerce Commission entered May 4, 1956, in its Docket No. 31737 is reproduced as Appendix "C" hereto with that portion directly involved shown in italics. The complaint of Cramet, Inc., was consolidated for hearing with two other related proceedings which had arisen out of the same general controversy, but which had been initiated prior to the filing of the Cramet complaint. Such related proceedings were those in I.&S. Docket No. 6284, *Rutile Ore from Gulf and South Atlantic Ports to Tennessee*, and Docket No. 31677, *Central of Georgia Railway Company* v. *The Cincinnati, New Orleans and Texas Pacific Railway Company.*

The consolidated proceedings stemmed from and were the outgrowth of efforts of the CNO&TP to exclude other carriers from the area known as Boyce, Tennessee, in the competitive commercial sense so that traffic destined to or from industries and locations on its switching tracks at Boyce could not be handled at the lowest available rates via routes of lines competing with those of the Southern Railway System, of which the CNO&TP is a part. This effort is representative of a general program inaugurated by the Southern Railway constituent lines to appropriate and thereafter to monopolize traffic to the greatest possible extent (Tr. pp. 57-59). Reported decisions in a few cases exemplifying such efforts are *Salt Cake from Bessemer City, N.C. to Foley, Fla.*, 298 I.C.C. 544; *Cancellation of Routing, Paper, Gainesville M. R. Co.*, 299 I.C.C. 107; *Carolina, C&O Ry. Co.* v. *Southern Ry. Co.*, 299 I.C.C. 335 (affirmed 153 F. Supp. 57, now on appeal to this Court); *Routing, Coal from Origins on Louisville & N. R.*, 300 I.C.C. 125; *Tennessee, A&G Ry. Co., Cancellation of Routing*, 300 I.C.C. 515.

Thus, it is apparent that the situation involved is not an isolated instance, but is part of the over-all program of the Southern Railway System constituent lines to eliminate their competition wherever possible.

PROCEEDINGS BEFORE THE COMMISSION AND HISTORY OF THE CASE

The consolidated proceedings before the Commission is styled *Rutile Ore from Gulf and South Atlantic Ports to Tennessee*, reported at 298 I.C.C. 439. As shown therein, the proceedings arose as a result of suspension by the Commission of schedules publishing

a reduced rate on rutile ore from Gulf and South Atlantic ports to Boyce, Tennessee, restricted to apply only over the Southern Railway System long haul routes. Subsequent to that suspension and the ordering of an investigation by the Commission, Central of Georgia Railway Company filed its complaint in Docket No. 31677 seeking a cease and desist order to prevent a continuation of the practices engaged in by the CNO&TP in its exclusionary rate activities, enabled and brought about through the cancellation of reciprocal switching at Boyce on June 23, 1954. It was alleged in this complaint that CNO&TP was engaging in practices which were violative of Sections 1 (4) and 3 (4) of the Interstate Commerce Act (49 U.S.C. 1(4) and 3(4)) in that other lines were permitted to participate in the proposed rates involved in I. & S. Docket No. 6284, but Central of Georgia Company was not, and that unless prevented by order of the Commission, the CNO&TP would publish other rates also excluding the Central of Georgia Railway, from participation therein. The Nashville, Chattanooga & St. Louis Railway,[1] Tennessee, Alabama & Georgia Railway Company and Atlantic Coast Line Railroad Company intervened in support of the complainant.

The complaint of Cramet, Inc., in Docket No. 31737 was subsequently filed against all carriers (including the railroad appellees herein) which were parties to the existing rates from the ports to Boyce, Tennessee, alleging violation of Sections 1 and 3 of the Inter-

[1] The Nashville, Chattanooga & St. Louis Railway has now been merged into the Louisville and Nashville Railroad Company, pursuant to authority granted by the Interstate Commerce Commission in Finance Docket No. 18845.

state Commerce Act (49 U.S.C. 1 and 3), and seeking an order commanding restoration of Boyce, Tennessee, to the reciprocal switching limits of Chattanooga, Tennessee; the prescription of reasonable rates via all present routes to and from Boyce no higher than those maintained over any one such route; and the award of reparation on past shipments of rutile ore to the basis prescribed for the future. Central Soya Company, Inc., which also had built a new plant at Boyce, and the Chattanooga Chamber of Commerce intervened on behalf of the complainant in this Docket as well as in No. 31677.

Boyce, Tennessee, has historically been within the switching limits of the City of Chattanooga, Tennessee, the Boyce area being partly within and partly without the corporate limits of the City of Chattanooga (Tr. pp. 22, 75-77; Exhibit No. 8). It is adjacent to the Southern Railway System's Citico Yard and in fact the switching track by which the CNO&TP serves Cramet, Central Soya and other Boyce industries actually breaks out of the classification yard (Tr. p. 288; Exhibit No. 8). Chattanooga, Tennessee, is served by six line-haul carriers, including Central of Georgia Railway Company, the Tennessee, Alabama and Georgia Railway Company, the Louisville and Nashville Railroad Company (formerly The Nashville, Chattanooga & St. Louis Railway), Southern Railway Company, The Alabama Great Southern Railroad Company, and the CNO&TP, the latter three carriers being lines of the Southern Railway System.

Physical track connections and joint interchange arrangements were established and have been in effect for many years by the carriers serving Chatta-

nooga, including the CNO&TP (Tr. pp. 18-19, 100, 116-117). Joint rates and through routes with established divisions or percentages have also existed for many years (Tr. pp. 19-20, 360, 102, 117). By means of this situation, joint rates and through routes to and from firms and industries on the switching tracks of the CNO&TP in the Boyce area have been available to shippers and receivers of freight destined to or forwarded from Boyce industries. By virtue of reciprocal switching arrangements, all lines serving Chattanooga, Tennessee, have been able to reach those industries as a terminating or originating line-haul carrier and the reciprocal switching arrangements made it impossible for the CNO&TP to so adjust rates over the line-haul routes of the Southern Railway System lines as to make non-competitive the routes of competing carriers reaching Chattanooga. By virtue of reciprocal switching, the Boyce industries have had the advantage of generally unrestricted rates, routes and transit arrangements so that car supply and other transportation services of all Chattanooga railroads were available to them (Tr. pp. 218).

Having been pointed out the advantages of the reciprocal switching arrangements in effect in the Boyce area, a plant site in that area was ultimately purchased by Cramet, Inc., on or about September 3, 1953 (Tr. p. 163). Because reciprocal switching was not available at another location, a site valued at nearly $100,000 and offered Cramet for only one dollar had been refused (Tr. pp. 147-148). Subsequent to the purchase of the Boyce property, grading and construction of a titanium plant was undertaken which, completed, represents an investment in excess of $25,000,000 (Tr. p. 157). A controlling factor in the selection of the site

for the Central Soya Plant in the Boyce area was also the fact that reciprocal switching arrangements had been in effect for many years, thereby making available to the plant the services of all Chattanooga railroads with flexible transit arrangements and generally unrestricted rates and routes (Tr. pp. 218-219).

Soon after the construction of the Cramet plant had commenced and in fact on June 23, 1954, the CNO&TP cancelled all such switching arrangements except in instances where the applicable rate from or to Chattanooga is different from the line-haul rate on a like shipment from or to Boyce (Tr. P. 24).[2] Inasmuch as in reality the rates from or to Boyce and Chattanooga are seldom, if ever, different, the effect of such

---

[2] The tariff provision reads as follows (Exhibit No. 2; 298 I.C.C. 449):

ITEM 15. APPLICATION OF RATES TO AND FROM INDUSTRIES AND LOCATIONS AT BOYCE, TENN.

(1) The CNO&TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn., except as provided in paragraph (2) of this item.

(2)(a) Industries and locations on the CNO&TP Ry. Co. at Boyce, Tenn., are included in the Chattanooga, Tenn., switching limits, and the CNO&TP Ry. Co. will switch carload traffic between said industries and locations and points of interchange with connecting lines at Chattanooga, Tenn., only to the extent provided in subparagraphs (b) and (c) of this item.

(b) Where there is an applicable commodity rate or mileage scale rate in effect to or from (as the case may be) Chattanooga, Tenn., and the same commodity rate or mileage scale rate is not in effect via any line or route to or from (as the case may be) Boyce, Tenn., or

(c) When there is an applicable class rate in effect to or from (as the case may be) Chattanooga, Tenn., and the same class rate is not in effect via any line or route to or from (as the case may be) Boyce, Tenn.

publication was that on competitive traffic destined to or from Boyce, Tennessee, the CNO&TP would refuse to switch (Tr. pp. 24-26).

This action on the part of the CNO&TP effectively localized the firms and industries on its switching tracks at Boyce and set the stage for the commercial closing by exclusionary rate adjustments of routes theretofore open to the shippers and receivers at Boyce on the same competitive basis.

Rutile ore, the commodity over which the controversy arose, is a raw material used by Cramet in the manufacture of titanium metal. When shipments of this commodity began to move into the Boyce plant from Australian origins through the ports, the only applicable rates were the Class rates which were available to Cramet over the routes of all carriers serving Chattanooga. At the time of the hearing on June 6-7, 1955, a total of eighty-eight cars of rutile ore had been imported by Cramet through the ports of Savannah, Georgia, and Charleston, South Carolina (Tr. pp. 26, 255). Seventy-three cars moved through the port of Savannah, fifty-seven of which were handled by the route of the Central of Georgia Railway to Chattanooga, thence CNO&TP; two cars were handled via Central of Georgia to Atlanta, thence Southern Railway and CNO&TP and the remaining fourteen cars were handled via the route of the Southern Railway to Chattanooga, thence CNO&TP (Tr. p. 28). All fifteen cars transported through the port of Charleston were handled via the route of the Southern Railway; four to Oakdale, Tennessee, thence CNO&TP and the remainder to Chattanooga, thence CNO&TP (tr. pp. 283-286).

During the spring of 1954, Cramet sought a reduction in the rates on imported rutile ore and in the negotiations which followed, the Central of Georgia Railway suggested a rate of $8.50 per ton to be applicable from shipside, from Savannah to Chattanooga (Tr. p. 33). By such a rate, the Central of Georgia and other lines participating in routes from Savannah, could reach the Cramet plant at Boyce through the then existing reciprocal switching. After the cancellation of reciprocal switching through the means already mentioned, the Southern Railway System on August 9, 1954, proposed the rate of $8.50 from South Atlantic and Gulf ports to Chattanooga and to Boyce, to apply from shipside, with routing to be restricted to the lines of the Southern Railway System when from ports served by the Southern and restricted to routing affording those lines their maximum hauls from other ports (Tr. pp. 30-34). The cancellation of reciprocal switching was an integral part of this proposal, since only by virtue of such cancellation was the proposal possible. The Central of Georgia then proposed the establishment of a proportional rate to Chickamauga (an intermediate point) which with the class rate factor beyond, produced a combination rate of $8.50, thereby meeting the Southern's proposal (Tr. p. 34).

This action on the part of the Central of Georgia Railway resulted in instructions being issued by the Southern Railway System that they would publish a through rate from Savannah to Chattanooga and Boyce with the restricted routing heretofore explained, ten cents per ton lower than any combination published for the account of the Central of Georgia (Tr. pp. 34-36, 39-40). Ultimately, Central of Georgia un-

dertook a revision of the proportional rate to Chickamauga so as to produce a combination rate of $7.50 to Boyce and the Southern announced a single-factor through rate of $7.40 (Tr. 40-41). Both of these rates and the rates from the other ports proposed by Southern Railway System were published to become effective on November 9, 1954.

Before any of these rates became effective, however, protests and petitions for suspension were filed against the rates from Savannah, predicated primarily upon disruption of port equalization. Among such protests and petitions for suspension was one filed on behalf of the Southern Railway and CNO&TP which sought suspension not only of the Central of Georgia Railway proportional rate, but also of their own single-factor through rate from Savannah to Chattanooga and Boyce on the ground that such rates were below minimum reasonable rates. (Tr. pp. 41-42). Knowing full well that this protest and petition for suspension was motivated by a desire on the part of the Southern and CNO&TP to secure a cargo of rutile ore then on the high seas through the port of Charleston, the Central of Georgia Railway, in its answer, requested that if any of the rates were suspended that the entire adjustment from all ports be suspended (Tr. pp. 42-43). All of the rates were therefore suspended and the issues involved disposed of by the Commission in I. & S. Docket No. 6284.

As has already been related, the complaints in Docket No. 31677 and Docket No. 31737 stemmed from the action of the Southern Railway and CNO&TP in their attempt to cancel through rates in the manner described.

After hearing and the consideration of exceptions and replies thereto, the Commission, by Division 2, entered its report and orders on May 4, 1956. The ultimate findings in that report are as follows (298 I.C.C. 448):

"In Investigation and Suspension Docket No. 6284, we find that it is not shown that the proposed cancellation of routes, in connection with the establishment of the proposed reduced rates, is consistent with the public interest, and that the proposed schedules therefore are not shown to be just and reasonable.

"In No. 31677, we find that the defendants' refusal to join in the establishment and maintenance of reduced rates over routes presently maintained from South Atlantic and Gulf ports to Boyce, the same as when the defendant receives a line haul into Chattanooga, is unjust and unreasonable.

"In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga, is unjust and unreasonable.

"We further find in No. 31737, that the rates presently in effect on rutile ore, in carloads, from the various South Atlantic and Gulf ports embraced herein to Chattanooga and Boyce were, are, and for the future will be unjust and unreasonable to the extent that they exceeded, exceed, or may exceed rates, subject to a minimum of 80,000 pounds, from shipside, of $8.50 from the various ports embraced herein other than from

Newport News and Norfolk, and of $9.50 from the latter two ports, plus applicable increases as authorized in Ex Parte Nos. 175 and 196."

* * * * * * * * * *

"Orders requiring cancellation of the schedules proposed in I.&S. No. 6284, and the establishment of an adjustment as prescribed in No. 31737, will be entered. In view of the requirements of the order entered pursuant to the findings in No. 31737, the entry of an order in No. 31677 is unnecessary. The establishment of rates as thus required will avoid and remove any undue prejudice and preference as alleged in No. 31737."

These ultimate findings together with all subsidiary findings and conclusions contained in the report were incorporated by reference and implemented by the separate orders entered in I. & S. Docket No. 6284 and Docket No. 31737 on May 4, 1956. The order in I. & S. Docket No. 6284 required cancellation of the involved schedules on or before June 11, 1956, and the order in Docket No. 31737 ordered establishment by the defendants "according as they participate in the transportation" to establish and thereafter to maintain rates in accordance with the finding quoted above on or before August 10, 1956, upon not less than 30 days' notice and further ordered the CNO&TP to establish on or before the same date upon the same notice and thereafter to maintain and apply switching charges, and provisions relating thereto, on carload traffic between Chattanooga and Boyce "that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga."

By order dated July 6, 1956, the effective date of the order in Docket No. 31737 was postponed until August 27, 1956. On July 16, 1956, Southern and CNO&TP filed a petition for reopening, reconsideration and reargument before the entire Commission. On July 25, 1956, the Commission stayed the outstanding order of Division 2, pending disposition of the petition. Replies to the petition were filed thereafter and, on October 1, 1956, the entire Commission entered an order denying the petition for reopening, reargument and reconsideration, in which it stated:

> "*It is ordered,* That the petition be, and it is hereby, denied, for the reasons that the findings of fact made in the report and the conclusions of the Commission based thereon are fully supported by the evidence; and that the petition does not show substantial grounds to warrant reopening the proceedings for reargument and reconsideration.
>
> "*It is further ordered,* That the order entered in I. & S. No. 6284 and 31737 on May 4, 1956, requiring the carriers to take certain action, which, pursuant to Section 17(8) of the Interstate Commerce Act, was stayed pending disposition of the petition, be, and it is hereby reinstated and modified so as to postpone to November 21, 1956, the effective date of the order in I. & S. 6284 requiring respondents to cancel certain schedules upon not less than one day's notice to this Commission and to the general public; and to December 20, 1956, in No. 31737, requiring the defendants to take certain action upon not less than 30 days' notice."

THE PROCEEDING BEFORE THE DISTRICT COURT

On November 16, 1956, the appellants (CNO&TP and the Southern Railway Company) filed a complaint in the United States District Court for the Eastern District of Virginia, attacking directly only the provisions of the Commission's order of May 4, 1956, as amended by subsequent stay orders in Docket No. 31737, relating to switching, as heretofore mentioned. The specific provisions directly attacked are those contained in the third ordering paragraph of the order of May 4, 1956, shown in Appendix "C" hereto. Appellants prayed the Court, to issue a temporary restraining order, an interlocutory injunction, and upon final hearing enter a decree permanently suspending, enjoining, setting aside and annulling the order of the Commission under attack. Pursuant to appellants' request, Honorable Sterling Hutcheson, United States District Judge, entered a temporary restraining order on November 16, 1956, temporarily restraining "the defendants * * * from making effective those parts of the orders of the Interstate Commerce Commission requiring the establishment of reciprocal switching at Boyce, Tenn., namely, the third ordering paragraph of the order of May 4, 1956, and the first and second ordering paragraph of the order of October 1, 1956, in its Docket No. 31737, *Cramet, Inc.* v. *Alabama Great Southern Railroad Company, et al.*," and directed that said restraining order continue in force and effect "only until the hearing and determination by the full court of the validity of said order."

Although appellants sought and obtained the temporary restraining order designed to retain the status quo, on November 16, 1956, there was filed with the

Interstate Commerce Commission a tariff in which there was published in connection with the rates prescribed in the second ordering paragraph of the Commission's order of May 4, 1956, in Docket No. 31737, restrictive routing which had been condemned by the Commission's findings and order of May 4, 1956, in I. & S. Docket No. 6284. This action could not have been taken without the benefit of the temporary restraining order and showed clearly that appellants were unwilling to participate with competing carriers as required by the Commission's orders.

Under the circumstances, upon intervention in accordance with 28 U.S.C. 2323, the Railroad appellees herein asserted a counter-claim to require obedience to the provisions of the Commission's orders prescribing publication of certain rates via the same routes over which the class rates on rutile ore were applicable.

On June 19, 1957, the District Court handed down its opinion denying the relief sought by appellants, dissolving the temporary restraining order and granting the relief sought by the counter-claim. That opinion is now reported as *Southern Railway Company* v. *United States,* 154 F. Supp. 562. Final judgment in accordance with the opinion was entered on July 12, 1957.

While this appeal is taken only from that portion of the District Court's judgment denying the relief sought in appellants' complaint relating to the third ordering paragraph of the Commission's order of May 4, 1956, it is apparent that the reciprocal switching therein involved is the key to their entire program of restricting routes to Boyce, Tennessee. Events which have transpired since the Commission's report

and orders at issue and which were the subject of the counterclaim in the suit before the District Court show clearly that the Commission was correct in requiring Boyce to be restored to the Chattanooga switching limits. Otherwise restrictive routing will be further imposed by the CNO&TP, giving rise to further proceedings before the Commission.

ARGUMENT

Appellants rely upon five principal assignments of error in support of their appeal (Juris. St. pp. 4-5). Only four of them were urged in argument and it would therefore appear that the fifth has been abandoned. However, out of an abundance of caution, all five will be discussed since it is submitted that none of them has sufficient substance to merit serious consideration.

1. Appellants contend that the District Court erroneously overlooked the finality of the CNO&TP tariff cancelling reciprocal switching effective June 23, 1954, and erroneously assumed it to be under suspension. It is urged that since the Commission did not suspend the schedules which effectively cancelled reciprocal switching on June 23, 1954, prior to the effective date thereof, that the Commission was thereafter precluded from ordering its restoration except upon giving due regard to the provisions of Section 15(4) of the Interstate Commerce Act (49 U.S.C. 15(4)).[3] This contention completely overlooks the fact

[3] Section 15(4) reads as follows:

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in each

that the cancellation of reciprocal switching alone did not have the effect of cancelling routes. Hence, restoration of reciprocal switching does not have the effect of creating new routes. To contend that the Commission was precluded from correcting this situation so as to preserve existing routes on a competitive rate basis is patently unsound and will be more fully discussed hereinafter. At this juncture, however, it seems sufficient to point out that the Commission's failure to suspend the switching schedules is not a final determination of their lawfulness so as to become *res judicata* in a subsequently brought complaint proceeding. In an appropriate proceeding, where it finds that the cancellation or refusal of a carrier to provide reasonable and necessary services, including switching service at an appropriate charge, is unjust and unreasonable or discriminatory and such finding is supported by substantial evidence, the Commission may properly require those services or prescribe that charge. *Great Northern Ry. Co.* v. *United States*, 81 F. Supp. 921, 925, affd. 336 U.S. 933; *Agricultural Products Co.* v. *Atchison, T. & S. F. Ry. Co.*,

---

route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

284 I.C.C. 505; *Atchison, T. & S F. Ry. Co.* v. *United States,* 279 U.S. 768, 776-777.

The allegations of confusion on the part of the District Court is amply refuted by a casual reading of the court's opinion. The quotation upon which appellants rely cannot be taken alone and characterized as the sole basis of the Court's consideration. For example, the following illustrates the court's complete understanding of the situation involved:

> "On June 23, 1954, after construction had commenced, C.N.O.& T.P. cancelled the reciprocal switching arrangements then in effect, except in instances where the rate from or to Chattanooga is different from the line-haul rate on a like shipment from or to Boyce". (154 F. Supp. 564).
>
> • • • • • • • • • • •
>
> "The C.N.O.& T.P., by its action of June 23, 1954, in denying competing carriers reciprocal switching services from Chattanooga to Boyce and the publication by Southern of its tariff of November 16, 1956, result in depriving shippers at Boyce of the advantages of competitive services and competitive carriers are foreclosed from participating in transporting freight to Boyce unless there is a division of the line-haul rate with Southern. A restoration of the reciprocal switching arrangements in effect for many years would relieve this situation." (154 F. Supp. 565).

The above clearly illustrates the fact that the District Court did not assume that the switching tariff involved was under suspension.

2. Appellants also contend that the District Court and the Commission misconstrued Section 15(4) of the Interstate Commerce Act in holding that the short-

hauling provisions of that Section have no application to the issues involved. (Juris. St. pp. 14-16).

We already have adverted to the fact that the cancellation by the CNO&TP of reciprocal switching alone did not have the effect of cancelling pre-existing through routes. It merely had the effect of requiring a division of the total freight charges rather than the assessment of a switching charge for the switching service performed insofar as competing carriers were concerned. In addition thereto, such cancellation deprived the shippers of the advantages of competitive services of all Chattanooga railroads, including transit arrangements, car supply and other transportation services.

Under such circumstances it is apparent that the Commission and the Court were not establishing new through routes and joint rates under Section 15(3) of the Interstate Commerce Act (49 U.S.C. 15(3))[4]

---

[4] Section 15(3) provides in part as follows:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * * If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

in requiring restoration of reciprocal switching and, therefore, have not misconstrued or erred in applying the provisions of Sections 15(3) and (4). The effect of the Commission's order is merely to continue in existence through routes which have been in effect for over fifty years. That being the case, it is apparent that Section 15(4) has no application. See *U. S.* v. *Great Northern Ry. Co.*, 343 U. S. 562, 572, 573, 575; *Virginian Ry.* v. *United States*, 272 U. S. 658.

3. It is further contended that the District Court erroneously held that the findings of the Commission and the evidence were sufficient to sustain the reciprocal switching order even though no unlawful discrimination had been found to exist under Section 3 of the Interstate Commerce Act, and no legal injury had been shown (Juris. St. pp. 16-17).

Appellants take the position that the Commission made only one finding in connection with the switching issue, that one being as follows (298 I.C.C. 448):

> "In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendants as a line-haul carrier to or from Chattanooga, is unjust and unreasonable."

This contention overlooks other subsidiary findings contained in the Commission's report. They are as follows:

"The Jackson Manufacturing Company, located in the vicinity of Boyce, just across the main-line rails from the station house at that point, is served by the Belt Railway, a subsidiary of The Alabama Great Southern Railroad Company, one of the Southern's constituent lines. This industry is treated as within the switching limits and is accorded the benefit of reciprocal switching requiring a longer switching movement than is required for industries lying across the main-line tracks of the Cincinnati, New Orleans & Texas Pacific. Another industry, the Quaker Oats Company, is served by a switch track connecting with Southern in the classification yard at or near the point at which interchange is made with connecting lines. This switch track, like that serving Cramet and Central Soya, extends from the Southern's main line at a point within the corporate limits, but the industry itself is outside of the corporate limits. The industry is treated as within the Chattanooga switching limits and has the benefit of reciprocal switching. This firm is in competition with Central Soya, as are two or three other firms handling similar products that are within the Chattanooga switching limits. (298 I.C.C. 447).

* * * * * * * * * * *

"The Southern contends that Cramet will suffer no injury from a restriction of these movements to its single-line routes, since it provides superior service. This would deny to this complainant the benefit of a switching service at a switching charge and deprive it of competitive service to and from Chattanooga. The issue here is similar to that considered in *Agricultural Products Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 I.C.C. 505, wherein division 2 found that the practice of the defendant Southern Pacific Company in refusing to place within the Phoenix, Ariz., switching district tracks served by that defendant in the vicinity of Tovrea, Ariz., was unjust, unreasonable, and unduly prejudicial and preferential." (298 I.C.C. 447-448).

There is no dispute with respect to the Commission's not having made a finding under Section 3 of the Interstate Commerce Act, but it is submitted that there was no reason or necessity therefor. The tariff provisions relating to switching did not have the effect of closing long existing through routes, nor, in fact, did they remove industries and locations at Boyce from the Chattanooga switching district. The tariff specifically says (*supra*, p. 7):

> Industries and locations on the CNO&TP Ry. Co. at Boyce, Tenn., are included in the Chattanooga, Tenn., switching limits * * *.

By virtue of this situation, it was incumbent upon the Commission only to make a finding that the action of the CNO&TP in failing to provide switching services at a switching charge was unjust and unreasonable under the provisions of Sections 1(4), 1(5), and 1(6) and to implement such findings with an appropriate order in accordance with Section 15(1) (49 U.S.C. 1 (4), 1(5), 1(6), and 15(1)).[5] This the Commission has

---

[5] Section 1(4), 1(5), 1(6) and 15(1) provide in pertinent part, as follows:

> Sec. 1(4). "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * * and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divi-

clearly done. Section 1(4) makes it the duty of common carriers by railroad to establish in the first instance, just and reasonable rates and charges, Section 1(5) makes every unjust and unreasonable rate unlawful and Section 1(6) obligates such carriers to establish reasonable regulations and practices. Section 15(1) empowers the Commission to determine and prescribe just and reasonable rates, regulations and practices when carriers fail in their duty to do so. The findings and order of the Commission clearly conform to the standards contained in the statute.

4. Appellants also contend that the Commission's order requiring reinstatement of reciprocal switching

---

sions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Sec. 1(5). "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Sec. 1(6). "It is hereby made the duty of all common carriers * * * to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the facilities for transportation * * * and all other matters related to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Sec. 15(1). "That whenever, after full hearing * * * the Commission shall be of the opinion that * * * individual or joint classification, regulation, or practice whatsoever of such carrier * * * is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial * * *, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed * * *."

causes an involuntary invasion of CNO&TP's terminal facilities in violation of Section 3(5) of the Interstate Commerce Act (49 U.S.C. 3(5))* and no finding was made to support that result. (Juris. St. pp. 16-23).

In view of the nature of the service performed by the CNO&TP it seems clear that the provisions of Section 3(5) are inapplicable. It has already been pointed out that the tarff provisions cancelling reciprocal switching on June 23, 1954, did not close the terminals to switching. Obviously then, Section 3(5) has no application. Moreover, there was no demand on the part of any of the carriers serving Chattanooga to make physical use of the CNO&TP terminals from the standpoint of operating their own switch engines over the CNO&TP's terminal tracks. Under similar circumstances this Court has held that Section 3 is inapplicable. See *Pennsylvania Co.* v. *United States,* 236 U.S. 351, 368-369.

Furthermore, appellants did not rely upon the Section 3(5) issue in the proceedings before the Commission, but on the contrary, in their exceptions to

---

* As applicable, Section 3(5) provides as follows:

"If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including mainline track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

the Examiner's proposed report filed January 3, 1956, contended that the Examiner had erred in assuming that they relied upon that issue. At page 20 of their exceptions they stated:

> "Southern calls attention to the fact that while this statement [appearing on sheet 3 of the Examiner's report stating that the Commission is asked to require the CNO&TP to permit use of its terminals and tracks at Chattanooga and Boyce by other rail carriers] is not a finding it is incorrect. The only issue with respect to reciprocal switching in the instant proceeding is whether or not the industries on the River track should be given reciprocal switching".

Not having relied upon the Section 3(5) issue before the Commission, appellants are now precluded from raising that issue here. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33; *Spiller* v. *Atchison, T. & S.F. R. Co.*, 253 U. S. 117; *United States* v. *Northern Pacific R. Co.*, 288 U. S. 490.

5. Appellants finally contend that the order of the Commission requiring restoration of reciprocal switching at Boyce will deprive them of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. (Juris. St. p. 5).

This point was not argued by appellants in their Jurisdictional Statement and it is apparent that such a contention is without merit. It has long been held by this Court that depreciation in the value of some business due to otherwise valid regulation is not such a loss of property without due process as would be violative of the Fifth Amendment to the Constitution. See *St. Louis S. W. R. Co.* v. *United States*, 245 U. S. 136, 142; *American Trucking Assns.* v. *United States*, 344 U. S. 298.

CONCLUSION

By reason of the foregoing, it is respectfully submitted that the decision of the District Court below is valid and correct in all respects and that this appeal presents no substantial questions.

WHEREFORE, premises considered, it is prayed that the judgment of the District Court be affirmed.

Respectfully submitted,

JOHN W. ADAMS, JR.
104 St. Francis Street
Mobile 8, Alabama

CHARLES P. REYNOLDS
147 Granby Street
Norfolk 10, Virginia

CLIFFORD T. COOMES
908 W. Broadway
Louisville 1, Kentucky

R. B. CLAYTOR
c/o Norfolk & Western Ry. Co.
Roanoke, Virginia

R. B. GWATHMEY
c/o Atlantic Coast Line R. Co.
Wilmington, N. C.

MARTIN A. MEYER, JR.
Investment Bldg.
Washington, D. C.

WALTER C. SCOTT, JR.
P. O. Box 642
Savannah, Georgia
Attorneys for Railroad Appellees

HITCH, MILLER & BECKMANN
P. O. Box 642
Savannah, Georgia
Of Counsel

PROOF OF SERVICE

I, Walter C. Scott, Jr., one of the attorneys for the Railroad appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2 day of December, 1957, I served copies of the foregoing motion on the other parties hereto, as follows:

(1) On the appellants, by mailing a copy in a duly addressed envelope with air-mail postage prepaid, to—

Messrs. Henry L. Walker
Arthur J. Dixon
James A. Bistline
Southern Railway Building
P.O. Box 1808
Washington 13, D. C.

R. Granville Curry, Esq.
631 Southern Building
Washington, D. C.

(2) On the United States, by mailing a copy in a duly addressed envelope, with air-mail postage prepaid, to—

The Solicitor General,
Department of Justice
Washington 25, D. C.

Victor R. Hansen, Esq.
Assistant Attorney General
Department of Justice

Messrs. James E. Kilday
CHARLES P. ~~Robert E.~~ Esherick
Attorneys
Department of Justice
Washington 25, D. C.

Lester S. Parsons, Jr., Esq.
United States Attorney
For the Eastern District of Virginia
Federal Building
Richmond, Virginia

(3) On the Interstate Commerce Commission, by m
ing a copy in a duly addressed envelope, with air n
postage prepaid, to—

Robert W. Ginnane, Esq.
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Samuel R. Howell, Esq.
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

(4) On Cramet, Inc., by mailing a copy in a duly
dressed envelope, with air mail postage prepaid to—

Robert N. Burchmore, Esq.
Burchmore, Good and Bobinette
2106 Field Building
Chicago 6, Illinois

Walter C. Scott, Jr.